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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 779

THE AMERICAN TOBACCO CO.; R. J. REYNOLDS TOBACCO CO.; BANK OF GREECE; BROWN & WILLIAMSON TOBACCO CORP.; COMMERCIAL CO. OF SALONICA, LTD.; JOHN D. NICOLAOU and NICHOLAS NICOLAOU, co-partners, doing business as D. Nicolaou Sons & Co.; A. MICHAELIDES, S.A.; and MacANDREWS & FORBES CO.,
Petitioners,

against

J.C., N.C. and A.C. HADJIPATERAS and HELLENIC LINES, LTD.

BRIEF FOR RESPONDENT HELLENIC LINES, LTD. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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We cannot convince ourselves that questions of law and valid reasons exist for granting of the writ as depicted in the Petition (pp. 3-15). We urge denial because in essence only matters of fact are involved, and the contentions made as to the law are unsound. Further, this litigation ought now to be terminated, having already endured some 11 years.

The analysis set forth below shows that only matters of fact are here involved and that all issues were correctly decided by the Court of Appeals.

Argument

This case is essentially one of fact and therefore not a case for review by this Court.

The Fact Situation—as to Stowage

Because of the attack by Italy on Greece on October 28, 1940, tobacco loaded for an autumn voyage from the Near East to the United States via Gibraltar had to be carried via the Red Sea and the Cape of Good Hope. Thus at the urging of the tobacco shippers and on orders of the Greek Government, a 30 days cool voyage was converted into a 118 days voyage through the tropics, with a double crossing of the Equator (Findings 45-51; R. 2252-3). The fact question was—Whether the damage to the tobacco cargo was due to improper stowage or to the inadequacy of the tobacco to withstand the exigencies of such a voyage.

As to all compartments except No. 3 tweendeck, the tobacco stowage was held proper and petitioners do not now question such finding. The stowage in the No. 3 compartments was similar to that in the other compartments. After the vessel's originally scheduled sailing date, 139 bales of tobacco were stowed in the No. 3 tweendeck. The Court of Appeals said:

> "The trial judge found that there had been no negligence in the stowage in No. 3 tweendeck and No. 3 hold, before the 139 bales were added;" (194 F. (2d) 449, 451).

The District Court thought the 139 bales impeded ventilation and thus caused the fire in the No. 3 hold. That Court made no other criticism of the stowage; no witness testified that the 139 bales caused the fire and the final stowage in the No. 3 tweendeck was not different from that in No. 2 tweendeck which "was stowed entirely with tobacco" (F. 27; R. 2249) and was held to be "properly stowed" (R. 2243; 2264).

The Court of Appeals reversed the finding of the District Court as to the 139 bales as "pure conjecture", based on an erroneous interpretation of the Master's protest relating to discharging expenses. There remained, therefore, no condemnation of the No. 3 tweendeck stowage, the only ground of stowage criticism having evaporated.

It is not surprising that the Court of Appeals found that the 139 bales did not affect the ventilation in the hold, for cargo contended in that Court that the additional cargo was stowed "on top of the cargo already there [in the tweendeck]" (Cargo's Reply Brief, p. 2).

The fact finding, unless reversed, would prevent consideration of the legal questions raised by petitioners as a basis for allowance of the writ. For on the facts, there could be no liability on the part of the carrier, quite apart from the legal questions argued in the petition.

Petitioners contend (p. 7) that the Court of Appeals improperly put the burden on cargo to prove "what particulars of stowage made it improper". But what the Court of Appeals actually did was to reject the only qualification made by the District Court upon its finding of good stowage. Petitioners failed, not because of some error as to burden of proof, but because the facts as found were against them.

The Fact Situation—as to Privity

The sole basis for the lower Court denying to the charterer the benefit of the fire exemption was that Court's belief,—erroneous as the Court of Appeals held,—that the charterer's Managing Director was chargeable with knowledge that the additional 139 bales had turned good stowage into bad stowage (81 F. Supp., at p. 446). Since the Court of Appeals rejected the District Court's view that the 139 bales caused the fire, the finding of privity with respect thereto failed. For the Court of Appeals found non-existent the fact with which charterer's Manager was said to be charged with notice.

The Fact Situation—as to the Tobacco

As to the adequacy of the tobacco to withstand the voyage, the Court found:

> "There is no proof that any tobacco was in fit internal condition for a voyage from Greece to the United States via Suez" (F. 92, R. 2260; see also ff. 89, 90, R. 2260).
>
> "Other than the Volos and Brown Williamson Cavalla tobacco, no tobacco self-heated no matter where stowed. The Volos and Brown Williamson Cavalla self-heated wherever stowed, whether tween deck or below" (F. 88; R. 2259-60).

This completely eliminated stowage and ventilation as causative factors. This was demonstrated further in Charterer's Reply to Cargo's Petition for Rehearing in the Court of Appeals, printed at R. 2364 to 2381.

Petitioners' Proposed Emasculation of the Fire Exemption—First Question

Petitioners state as the first question presented—Whether the fire statute affords exemption for damages not proximately caused by fire (p. 3). Analysis shows that the point relates to the heating that resulted in the ignition (p. 3-4). According to petitioners, all such heating up to the time the commodity bursts into flame would be excluded, with the burden on the carrier to prove that no damage occurred during the heating that led to the ignition.

Although petitioners' argument is based on the assumption that there was heating damage unrelated to, or at least preceding, the fire, there is no finding that such was the fact, either by the District Court or by the Court of Appeals. Is this Court to go through the Record to see whether there is testimony that would support an unmade finding that would raise the legal point petitioners urge?

Although fires resulting from spontaneous combustion are common, we know of no previous claim that the fire ex-

emption imposes the burden asserted by petitioners on the party claiming the exemption, nor do the cases upon which petitioners rely support their contention.

Petitioners' "Fire" Cases Distinguished

While those cases hold that "fire" implies "a visible flame", they do not hold that there must be an attempt to segregate the loss as between *before* and *after* the moment of ignition. They hold that the fire exemption is applicable only *if*, not applicable only *after*, "cargo actually ignites" (p. 4).

The Buckeye State, 39 F. Supp. 344, 347 involved the question whether there was a fire. There a grain cargo heated because an electric light had been left on, but there never was "visible heat or light"—hence no fire. There was no suggestion that even had fire eventually broken out, the loss, or the bulk of it, would still have been excluded from the fire exemption.

Cargo Carriers, Inc. v. *Brown S. S. Co.*, 95 F. Supp. 288, 290, is practically the same as *The Buckeye State* and was decided by the same Judge. Substantially the only difference was that the fact question—whether there was a fire—was closer.

Western Woolen Mill Co. v. *Northern Assurance Co.*, 139 Fed. 637, held that "fire" in an insurance policy likewise implied "visible heat or light". But again there was no suggestion that, had the spontaneous combustion finally eventuated into fire, the assured nevertheless would have been denied a full recovery.

Spontaneous Combustion Fires Are Not Outside the Fire Exemption

Squarely against petitioners' contention is *The Venice Maru, Consumers Co.* v. *Kabushiki Kaisha*, 133 F. (2d) 781; aff'd 320 U. S. 249. There, as petitioners state, "fire broke out in fishmeal spontaneously" and "presumably the meal must have heated for an appreciable length of

time before it fired" (p. 5). Petitioners would explain the holding that "all the damages sustained by cargo was the proximate result of fire", as merely the result of counsel's oversight!

Petitioners seek to give the impression (p. 5) that the District Court did not consider this question. But Judge Rifkind rejected the very argument presented by petitioners here (81 F. Supp. 438, at p. 446), as did also the Court of Appeals (194 F. (2d) 449, at p. 451).

Petitioners urge that the present decision would tend to encourage negligence leading up to a fire (p. 8). But that argument is, in effect, an attack upon the policy of the law in relieving the carrier from liability in respect of even negligent fires, provided the shipowner is not privy to the negligence of its subordinates. Congress, not the Courts, should consider that argument. The statutory fire exemption cannot be repealed by the Courts on the basis of some assumed policy of the law "to encourage diligence by a carrier".

In *The Venice Maru,* mentioned above as a spontaneous combustion case, open to the same argument as petitioners' contention here, this Court frowned upon "a frustration of the purpose of the Act [the fire exemption]". 320 U. S. at 254.

In *The Vallescura,* 293 U. S. 296 which petitioners rely on, there was held to be the equivalent of a finding that some of the damage was due to improper ventilation, rather than sea perils. But there is no corresponding finding here that part of the damage was due to a non-fire cause.

As to Petitioners' Second Question

The second point proposed by petitioners (p. 8) begs the question in assuming that the fire was "caused by negligent stowage", an erroneous assumption in view of the decision of the Court of Appeals. To support their point, petitioners would reargue the fact question as to the propriety of the No. 3 tweendeck stowage.

Although petitioners assert that the District Court made a general finding of improper overstowage of No. 3 tween-deck, "without relation to which particular shipments created the overstowage" (p. 10), it is clear from the part of the District Court's opinion to which petitioners refer, as well as the District Court's findings (ff. 28-30, 94; R. 2249-50, 2260-61), that any criticism of the stowage related entirely to the 139 bales. This criticism, as we have seen, was eliminated from the case by the Court of Appeals and only a fact reversal could reinstate it.

But if petitioners' assumption of negligent stowage were accepted, the answer is simple to the legal question propounded—What further is required to make the carrier liable for fire damage? Indeed, petitioners themselves answer the question by quoting from the Carriage of Goods by Sea Act—"the actual fault or privity of the carrier". It is the fact decision on this point (decided in favor of respondent) that the petition concerns itself with, not with any question of law.

As to Petitioners' Third Question

This question, in substance, is—Whether cargo must be fit for carriage upon a non-contemplated and more dangerous voyage when such voyage has become necessary because it has become impossible (without fault of the carrier) to perform the contemplated voyage? Or, must the shipowner, although not responsible for the necessity of the change, bear the risk as to cargo's adequacy for the changed, more dangerous, voyage?

Petitioners do not give any reason why this risk should be shifted to the carrier. Surely the fact that cargo may be fit for carriage on *some* voyage is hardly a basis for holding that fitness of the cargo is not required with respect to the only possible voyage, the substituted voyage undertaken with cargo's consent and upon its urging.

Petitioners base their argument on a claim of "negligence in stowage" (p. 15), so that here again petitioners

are resting on an assumed fact situation contrary to that found by the Court of Appeals.

No Adequate Reason Advanced for Allowance of the Writ

As we have seen, the three specific questions suggested in the petition either do not arise or involve only fact matters.

No question of broad public interest is presented. The case does not present any novel question as to the interpretation of the fire exemption. This is not surprising, since the fire exemption has gone back over a century in this country and over a century and a half in England. *Providence, etc., S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 602. There is no conflict between the Circuits for this Court to resolve, and although the litigation is doubtless of importance to the parties, such financial interest is not a basis for the writ.

Conclusion

For the reasons above set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.

New York, N. Y., May 27, 1952.

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